COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Rulemaking by the Department of Telecommunications)

and Energy, pursuant to G.L.c. 166, §25A, and)

220 C.M.R. §§ 2.00 et seq., to amend the)

regulations at 220 C.M.R. §§ 45.00 et seq.)

to Establish Complaint and Enforcement) D.T.E. 98-36

Procedures to Ensure that Telecommunications)

Carriers and Cable System Operators have)

Non-Discriminatory Access to Utility Poles,)

Ducts, Conduits, and Rights-of-Way.)

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SUPPLEMENTAL COMMENTS OF RCN-BECOCom, LLC

September 17, 1999

I. INTRODUCTION

These comments of RCN-BECOCom, LLC ("RCN") are filed in response to the Department's Notice and Request for Further Comments dated August 27, 1999. RCN appreciates this opportunity to supplement its earlier comments and address these very important issues. In its Initial Comments, RCN devoted substantial attention to the terms and conditions applicable to telecommunications carriers' ability to attach their cable to utility poles, ducts, conduits and rights-of-way on a fair basis, without unnecessary delay or expense. This concept is an absolutely critical component of the open, competitive telecommunications market envisioned by the Telecommunications Act of 1996 and the Department. As urged in such comments, new competitors need expeditious and efficient access to utility poles, ducts, conduits and rights of way. Without such access such competitors will be impeded in their efforts to add infrastructure and otherwise contribute to the development of competition. Therefore, RCN reaffirms its earlier comments and urges the Department to implement those comments into appropriate rules.

Likewise, to provide the fruits of competition to the broadest possible range of customers, it is necessary to ensure carriers reasonable access to ducts and conduits inside buildings. As described below, such access is sometimes limited improperly, including by exclusive access arrangements between a landlord and a given carrier. Therefore, in these Supplementary Comments, RCN addresses the issue of non-discriminatory access of telecommunications companies across private property to supply tenants with service. RCN submits that it is in the public interest to maximize access by telecommunications companies to such tenants as part of the policy embodied in the Telecommunications Act of 1996, which generally sought to open all telecommunications markets to competition. (See RCN Initial Comments, page 1). Indeed, ensuring open access by carriers inside of buildings is critical to reaching a large number of telecommunications services consumers. As Congressman Markey recently stated in the May 13, 1999 Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee on Building Access by Telecommunications Providers:

> We have a voice and video and data industry that wants to provide competition, lower prices, better service to the one-third of Americans that live in apartment buildings and to business that operate in large structures across the country. And on the other hand we have legitimate concerns on the part of the real estate industry, the tenant safety, constitutional property right issues, compensation issues that all legitimately are being raised by the other side.
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> I think that our task is now very well formed for us. I think it's important for us to get it resolved and I would hope that this would be the kickoff of our effort to find some common sense solution that legitimately deals with the issues raised by all parties, but towards the goal of ensuring that there is low-priced competition available for every tenant in America.

RCN's comments below seek to balance the competing interests and suggest means and bases for the Department to help ensure that one-third of the potential communications customers are able to reap the benefits of competition by choosing among different providers for voice, data and video services.

II. THE DEPARTMENT HAS JURISDICTION AND SHOULD USE IT TO BRING OPEN ACCESS TO TENANTS IN PRIVATE BUILDINGS

A. The Department Has Broad Authority Over Conduits and Ducts.

The power of the D.T.E. to regulate access to poles, conduits, ducts and rights of way is reserved to the Commonwealth by the Federal Pole Attachment Act, 47 USC 224 (c). This power, in turn, may be exercised pursuant to G.L.c.166, Section 25A, which grants the D.T.E. jurisdiction to determine and enforce "the rates, terms and conditions *of use* of poles or of communication ducts or conduits of a utility for attachments of a licensee in any case in which the utility and licensee fail to agree." [Emphasis added.]. A "utility" is defined in the same section as "any person ...that owns or controls or shares ownership or control of poles ducts, conduits...for supporting or enclosing wires or cables for the transmission of intelligence by telegraph, telephone or television or for the transmission of electricity for light, heat or power." Therefore, to the extent that a person owns or controls ducts and rights of way for supporting or enclosing wires for telecommunications or for transmission of electricity in a building, the D.T.E. can require reasonable access to those facilities to allow consumers the broadest possible choice. RCN's suggestions already filed in this docket to the extent applicable to an in-building environment would also pertain here.

B. Where Some Utilities Have Access Rights, Others Must Be Afforded the Same

Clearly, the definition of "utility" above includes telecommunications companies with permits or licenses from landowners who have tenants on their premises. Therefore, where a landowner has already allowed one telecommunications carrier to bring wire inside its building, the landowner, subject to constitutional constraints, must let others have access as well. The D.T.E. must ensure fair and reasonable terms and compensation with respect to such access rights. The recent decision, Gulf Power Company v. U.S., 1999 LW 699763 (September 9, 1999, 11th Cir.(Fla.)) which applies the holding of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), to non-discriminatory access under 47 USC 224 (f), supports this concept. Gulf Power decided that application of the non-discriminatory access provisions of the Federal Pole Attachment Act constitute a taking of property subject to the Fifth Amendment to the Federal Constitution, but as to a "utility" as defined under the federal act, the FCC rate-making provisions of the Federal Pole Attachment Act facially satisfy the "just compensation" provision of the federal constitution because judicial review of the FCC rate-making is provided in the Act. Accordingly, the D.T.E. may authorize access to "utility" rights of way granted by landowners in accordance with the principles of the Gulf Power case.

Moreover, RCN urges that in situations where a landowner exercises significant control over such rights of way, for example, by reserving power over the operation of such facilities, or to revoke a license and force abandonment of service, a landowner could constitute itself a utility under Sec.25A. In such circumstances the DTE could certainly impose requirements of reasonable access directly upon the landowner.

Failure to supply elevator, light, heat and power service by a lessor has been constituted a constructive eviction of a tenant. Burt v. Seven Grand Corp. 340 Mass. 124 (1959). In addition Mass. G.L.c.186, Sec.14 creates tenant rights in excess of implied covenants in leases. Section 14 provides a criminal and a civil remedy including costs and attorney's fees, against a residential landlord who willfully or intentionally fails to furnish "water,…[or] telephone service...to any occupant of such building or part thereof." [Emphasis Added]. Thus, there is collateral judicial and legislative support for efforts by the D.T.E. to ensure that tenants obtain access to telecommunications services.

Accordingly, it is the position of RCN that, where a "utility" owns a pole, conduit or duct or right of way for telecommunications or electric transmission purposes on property, residential or commercial, of a landlord, the D.T.E. has been granted jurisdiction to entertain and enforce a petition for pole attachments against the "utility", subject to rights, if any, of the landowner and utility to just compensation. For instance, M.G.L.A. c. 166A, Sec. 22 confers upon owners of CATV Systems (as defined in reference to 47 USC Sec. 522(7)) rights of entry for CATV systems with respect to multi-unit dwellings. RCN suggests that legislative enlargement of C.166A Section 22 to apply to commercial units and to apply to telecommunication facilities other than CATV systems, may be advisable, but we believe the D.T.E already has jurisdiction over "utilities" in respect to

telecommunication and electric transmission facilities already situated on a landowner's premises.

A. Carriers Should Not Be Precluded From Providing Service To Certain Buildings Because of Exclusive Contracts.

A significant problem that RCN has faced in terms of trying to provide its service to all the consumers that desire such service is where various carriers have contracts with a landlord that directly exclude access by any further carriers. This has been a particular problem in the case of video services where RCN has simply been excluded from certain buildings where Cablevision has an exclusive contract. Certain technical hurdles that owners or carriers have raised also serve to unnecessarily exclude additional carriers. See Attachment A. Testimony of Scott Burnside before the May 13, 1999 Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee on Building Access by Telecommunications Providers.

With respect to future facilities and rights of way, RCN also maintains that the execution or acceptance by a utility of a telecommunications or electric transmission license or easement with a landowner for the installation of poles, ducts or conduits, which is non-assignable or which excludes other telecommunications providers from subsequent access could be declared invalid by the D.T.E. pursuant to C.166 Sec. 25A. Such power may be implied under the authority of Section 25A, as the D.T.E. has the power to regulate utilities and licensees with respect to attachments, and any exclusive and non-assignability arrangement would be an invalid impediment to the D.T.E.'s non-discriminatory access policy. Certainly an exclusive arrangement that bars a CATV system, attachments, poles, ducts or conduits from multiple dwelling units is currently violative of C.166A, Section 22, and is clearly contrary to the intentions of Congress in fostering open competition under the Telecommunications Act of 1996.

CONCLUSION

For the reasons set forth herein, RCN respectfully urges the Department to adopt rules and support legislation that would allow for open and efficient access to poles, ducts, conduits, and rights-of-way, whether in public ways, or in buildings that are privately owned. Tenants should not be deprived the choice of their telecommunications provider by virtue of technical or contractual impediments to competitors. Anything less will delay and diminish the benefits of competition to consumers within the Commonwealth of Massachusetts.

Respectfully Submitted,

RCN-BECOCom, LLC

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